Supreme Court, U. S.
FILED
OCT 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1908.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION,

Petitioners,

v.

RICHARD A. ASH, on Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED.

I. Did the Court of Appeals correctly determine that there was an implied cause of action in favor of a corporate shareholder where corporate funds were spent in violation of 18 U. S. C. § 610, in light of the legislative history of that provision and its self-evident purpose to protect minority shareholders from having corporate funds spent for political purposes?

II. Was the Court of Appeals correct in remanding the case to the District Court for trial on the question of whether the expenditures in question were for a "partisan purpose" rather than ruling upon the First Amendment claims of petitioners?

COUNTER-STATEMENT OF THE CASE.

The United States District Court for the Eastern District of Pennsylvania granted defendants' motion for summary judgment on July 12, 1973. The District Court, without opinion, held that plaintiff lacked an implied right to prosecute a cause of action under 18 U. S. C. § 610. At the time summary judgment was entered, the record consisted of a complaint, an answer and a minimal stipulation of agreed upon facts. Plaintiff had had no discovery and the key factual allegations of the complaint were virtually undeveloped. These allegations were as follows:

> "13. At some time in 1971 or 1972, defendants entered into a plan involving the utilization of Bethlehem Steel's resources, including the expenditure of its funds, in connection with the 1972 United States presidential election.
>
> "14. The ultimate purpose of said plan was to influence the United States electorate to help bring about a Republican Party victory in said election. This purpose was solely in furtherance of the individual interests and beliefs of defendants and was in violation of state and federal law, and in derogation of the rights of the United States public, and of the approximate one half of the shareholders of Bethlehem Steel that are registered members of the Democratic political party.
>
> "15. Thereafter, in furtherance of said plan and purpose, defendant caused corporate resources to be utilized, including the expenditure of substantial funds in connection with said political campaign, including, *inter alia*, their causing to be prepared and disseminated at corporate expense, an advertisement entitled 'I Say Let's Keep the Campaign Honest. Mobilize "Truth Squads" . . .', attributed to defendant Cort."

In substance, the action of the District Court amounted to dismissal of the complaint for failure to state a cause of action cognizable in federal court.

On April 16, 1974, the United States Court of Appeals for the Third Circuit reversed the action of the District Court and remanded the case for further proceedings, consistent with its Opinion. The Third Circuit held that allowance of a private cause of action under 18 U. S. C. § 610 is proper [A18] [1] and found that there exists dispute as to a material factual issue [A22]. The Third Circuit observed that plaintiff had alleged that Bethlehem Steel Corporation had made partisan expenditures and that "on summary judgment we must accept as true plaintiff's allegation of partisanship." [A22].

Defendants now ask this Court to intervene as the case is being remanded to the trial court for development of a factual record.

1. Page citations refer to the Appendix to the Petition for a Writ of Certiorari, filed June 20, 1974.

ARGUMENT.

I. The Court of Appeals Correctly Held That There Is an Implied Cause of Action in Favor of Shareholders of a Corporation Whose Funds Have Been Unlawfully Expended in Violation of 18 U. S. C. § 610.

Petitioners seek to bring before this Court for review the decision of the Court of Appeals upholding the basic theory of the plaintiff that a violation of 18 U. S. C. § 610 creates an implied cause of action for damages in favor of one of the classes of persons it was intended to protect —corporate shareholders. There has been no discovery, let alone a trial, and hence the only issue before the Third Circuit was whether plaintiff stated a cause of action which he was entitled to attempt to prove in a trial in the District Court.

The Court of Appeals held that plaintiff had an implied civil cause of action for a violation of the criminal provisions of 18 U. S. C. § 610, which prohibits expenditures in connection with federal election campaigns by corporations and unions. In doing so, it followed the well-established rule that implied causes of actions for violations of criminal statutes will be held to exist where to do so would advance the purposes of the criminal provision. See *Wyandotte Transportation Co. v. United States*, 389 U. S. 191, 202 (1967); *J. I. Case v. Borak*, 377 U. S. 426 (1964); *Texas and Pacific Ry. Co. v. Rigsby*, 241 U. S. 33 (1916); *Reitmeister v. Reitmeister*, 162 F. 2d 691 (2d Cir. 1941); and *Fitzgerald v. Pan Amercian World Airways*, 229 F. 2d 499 (2d Cir. 1956). Petitioners do not quarrel with this general rule, but instead allege that based upon this Court's decision last term in *National Railroad Passengers Corp. v. National Association of Railroad Passengers*, 414 U. S. 453

(1974), the allowance of a private cause of action for civil damages was improper in this case. In plaintiff's view, the Court of Appeals correctly distinguished the *Amtrak* decision and held the private civil cause of action proper in this case.

In *Amtrak*, the plaintiffs sought to derive a cause of action from section 307(a) of the National Railroad Passenger Act of 1970, 45 U. S. C. §§ 501 et seq., in an action which sought to enjoin the announced discontinuance by Amtrak of certain passenger services. Plaintiff claimed that, as an association of railroad passenger users, it was one of the groups intended to be protected by the Act, and that since the statute prohibits the proposed discontinuations, the plaintiff had a right to seek a court order preventing them from going ahead. However, the very same section relied upon by plaintiff in *Amtrak* to provide it a cause of action, also contained specific authority authorizing the Attorney General of the United States to obtain similar relief for violations of that statute. In addition, section 307(a) also contained a provision authorizing, in certain very limited circumstances, affected employees, or their legal representatives, to seek court orders to stop allegedly unlawful discontinuation of passenger service. From these two provisions the Court concluded that Congress had considered the matter and had decided that there were only two persons who could bring an enforcement action—the Attorney General or in certain cases affected employees—and that it had explicitly excluded other potentially affected persons such as railroad passengers.

This Court's construction of section 307(a) was confirmed by its reading of the legislative history. It found that a proposal to amend that provision to allow a broader class of persons to bring suit for violations of a statute had been advanced and rejected by the Committee with jurisdiction over the matter, based largely upon the opposition of the Secretary of Transportation who was the official that would be responsible for the implementation of the Act. 414 U. S. at 459-460. Furthermore, this Court found that the discontinuance of uneconomic routes was part of a program necessary to save any passenger service in the United States, and that Congress intended Amtrak to be able to eliminate such service without going to the Interstate Commerce Commission or the various state regulatory commissions as had been required under prior law. Based upon this legislative history, the Court concluded that to allow private rights of action would substantially frustrate the purpose and would produce a "myriad" of lawsuits which could result in huge losses to Amtrak while litigation was pending. The result, the Court concluded, would be less efficiency rather than more efficiency as the Act intended. Based upon its finding that there was extensive scrutiny by Congress and the Executive, it concluded that it was rational for Congress to suppose that the Attorney General and, in limited instances, affected employees, should be the only ones who could object to proposed discontinuance. 414 U. S. at 464.

In plaintiff's view, the majority below correctly distinguished *Amtrak* and found its reasoning to be inapplicable to the facts of this case. *Amtrak* does not purport to repeal the general rule of *Wyandotte, Case* and the other authorities relied on by the Third Circuit. This case involves an alleged violation of a criminal statute, whereas in *Amtrak* the alleged implication was from a civil statute in which there were specific remedies for specific persons set forth in the very provision relied upon by the plaintiff there. The only remotely comparable aspect of the statute here is the recently enacted provision of Title III, 2 U. S. C. § 438(d)(1)-(5), which authorizes specific actions by the

Attorney General to restrain violations of the campaign reporting provisions of the federal election laws. That provision is specifically limited to that Title, whereas the cause of action involved here is in section 610 in Title 18, not in any portion of Title III of the Election Act of 1971. Furthermore, Section 438 deals with an entirely different kind of violation—reporting requirements—rather than illegal corporate contributions at issue here. There is simply no basis for concluding that a specific remedy with regard to one provision had any bearing whatsoever on the pre-existing rights and liabilities under another provision.[2]

Equally important is the fact that even if section 438 of Title III can be seen as a prohibition against injunctive actions, it would not stand in the way of a damage claim, which is involved here, since no person is assigned the function of collecting damages sustained by a corporation whose officers have violated section 610. This was not the case in *Amtrak*, where both the Attorney General and the party would be seeking similar relief in any action would be brought. The remedy of a criminal sanction will in no way aid the injured stockholders, and, in fact, a fine levied against the corporation will only compound the damages suffered by the shareholders at the instance of the wrongdoing officers.

As this Court has made clear in *Wyandotte Transportation Co. v. United States, supra*, the implication of a civil

2. At the time that the amendments in 1971 were made adding the specific civil relief provisions in Section 438, the only authority dealing with implied causes of action under the various criminal provisions relating to the federal election law was the decision in *Common Cause v. Democratic National Committee*, 333 F. Supp. 803 (D. C. 1971), which upheld private rights of action for violations of sections 608 and 609 of Title 18. Thus, it is at least arguable that Congress explicitly approved the holding in the *Common Cause* case, and surely there is nothing to suggest that it would have considered the matter differently with respect to implied causes of action for violation of section 610 of Title 18.

cause of action must be consistent with the purposes of the statute and be in favor of a class of persons intended to be protected. Construing section 610, this Court in *United States v. CIO*, 335 U. S. 106, 113 (1948), concluded that in enacting the ban on corporate contributions Congress was in part motivated by "the feeling that corporate officials had no moral right to use corporate funds for contributions to political parties without the consent of stockholders." This comment is borne out by the legislative history of the predecessor of Section 610, the Act of January 26, 1907, 34 Stat. 864. In calling for that legislation, President Theodore Roosevelt stated that "all contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes." 40 Cong. Rec. 96. These purposes were emphasized in debates on the floors of both Houses in 1971 relating to the amendments to section 610, which amendments are not relevant to this case. See Remarks of Senator Goldwater, 117 Cong. Rec. 29330, and Remarks of Representative Hansen, 117 Cong. Rec. 43380-81.

We submit that the clear legislative history and self-evident purpose of section 610 indicate that stockholders are among the class intended to be protected, and the Court of Appeals was correct in so holding. In doing so, it followed the long-established rule of implying civil causes of action for violations of criminal statutes. There is no conflict with any decision of this Court or that of any Court of Appeals. Presumably, there will not be a "myriad" of actions as was suggested in *Amtrak* because presumably public corporations do not violate the federal election laws in anywhere near the number of instances that would impose a burden on this Court. In short, the Court of Appeals' decision is entirely correct, and there is no basis for review by this Court of it.

II. There Is No Basis for This Court to Review the Construction Given by the Court of Appeals of Section 610 or to Consider the Constitutionality of Its Application in This Case Since the Matter Has Simply Been Remanded for Further Proceedings.

Petitioners also ask this Court to review what they claim to be an erroneous interpretation of section 610 which they allege to be in conflict with decisions of this Court and those of other circuits, as well as to review the claim that the application of section 610 to this case is violative of the First Amendment. This request of petitioners should be denied both because it represents a misreading of what the Court of Appeals said and did, and because in any event the proceedings are at a premature stage, with an incomplete record, which does not adequately present the questions for review by this Court.

As petitioners correctly point out, a series of cases in this Court and the Courts of Appeal have required that for an expenditure to constitute a violation of section 610, it must be used for "active electioneering" and not merely be used to discuss a particular issue. While the Third Circuit did not use the phrase "active electioneering," it specifically found that the expenditure to constitute a violation of section 610 must be for "a partisan purpose". It is apparent from the context of the discussion of the meaning of "expenditure" that the Court was aware of the parameters of that term and that it intended no deviation from any of prior cases.

The holding of the Court of Appeals was that in order for an expenditure to meet the test of being for a partisan purpose, the advertisement paid for need not specifically name the candidate. However, where the candidate is not named, it is a question of fact as to whether there was a partisan purpose connected with the advertisement, a question which can be resolved only after a trial based upon

all of the circumstances. This comports with common sense, for, if the advertisement in question had not referred to a "political candidate" who had alleged that big business was not paying its fair share of taxes, but instead suggested that it was a "radical from South Dakota" who made that claim, there can be little doubt that that would have been active electioneering against Senator McGovern, just as much as a reference praising "the current occupant of the White House" would have been active electioneering, for a partisan purpose, in favor of President Richard Nixon. The ruling by the Court of Appeals is wholly consistent with all of the other decisions construing the meaning of expenditure under section 610, and there is no basis for review by this Court of that holding.

As to the applicability of the First Amendment to prohibitions on corporations spending stockholders' money to advance the cause of candidates whom the stockholders may not approve, we do not believe that there are any serious First Amendment questions regarding that issue. While there may be First Amendment questions lurking on the penumbras of section 610, this case is not in a proper posture, nor is there any need for this Court to anticipate such questions at this time. This is, after all, a civil damage proceeding, and there is more than adequate opportunity for review by this Court at some future date should the defendants be held liable for damages in the District Court and that holding be sustained on appeal. The Court ought not to reach the constitutional issues on a barren record such as exists now.

In a closely similar situation to that at bar, *United States v. Auto Workers*, 352 U. S. 567 (1957), the Supreme Court considered the propriety of a criminal indictment brought under Title 18 Section 610, which alleged that the appellees had used union dues to sponsor commercial tele-

vision broadcasts designed to influence the electorate to elect certain candidates for Congress in connection with the 1954 election. The appellee raised in defense the argument that the statute as applied was violative of First Amendment rights to the United States Constitution.

The Court, in upholding the indictment, remanded the case for trial, refusing to decide whether the statute as applied to the activities in question was unconstitutional without the benefit of a full trial record. The Court stated on this point:

> ". . . only an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative processes especially demanded for constitutional decision." *U. S. v. Auto Workers, supra,* at 591.

CONCLUSION.

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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